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STATE OF MICHIGAN  
MACOMB COUNTY CIRCUIT COURT

KAREN A. MCGINNIS f/k/a  
KAREN A. FOUTS,

Plaintiff,

Case No. 2004-7056-DO

vs.

CHARLES D. FOUTS, JR.,

Defendant.

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OPINION AND ORDER

Plaintiff moved to modify consent judgment of divorce to terminate spousal support. After review by the Court Referee, it was recommended that plaintiff's motion to terminate spousal support be denied. Plaintiff objected; a de novo hearing was conducted on the issue on July 10, 2006 at which time the Court took the matter under advisement, and recommended submission of briefs detailing the contested issues. The briefs have been received and reviewed.

Background

The parties were divorced on August 16, 2005. One of the provisions within the Consent Judgment states the following:

- a. IT IS HEREBY ORDERED that Plaintiff shall pay directly to Defendant Spousal Support for the sum of Two Hundred Ninety-five and 89/100 (\$295.89) Dollars per month for Spousal Support commencing the date of this Consent Judgment of Divorce for a thirty-six (36) consecutive months, or, when Defendant has employment with medical coverage, whichever comes first. Said Spousal Support shall be taxable to Defendant and deductible by Plaintiff and shall be non-modifiable.
- b. IT IS FURTHER ORDERED that said Spousal Support is intended to be used for the purpose of payment for COBRA benefits.



Plaintiff was notified that as of 3/31/2006, defendant's COBRA benefits were terminated for non-payment of premiums. It is plaintiff's argument that because the consent judgment stated the spousal support ordered was for payment of COBRA benefits, and defendant failed to continue his health coverage, he is no longer entitled to spousal support, under MCL 552.28, which provides,

On petition of either party, after a judgment for alimony or other allowance for either party or a child, or after a judgment for the appointment of trustees to receive and hold property for the use of either party or a child, and subject to section 17, the court may revise and alter the judgment, respecting the amount or payment of the alimony or allowance, and also respecting the appropriation and payment of the principal and income of the property held in trust, and may make any judgment respecting any of the matters that the court might have made in the original action.

Defendant, in pro per, argues that the statement that the spousal support be used solely for the purpose of purchase of COBRA benefits was intended as background information, but not as a condition for receiving the spousal support benefit. Further, defendant emphasizes that the order for spousal support was non-modifiable, a condition to which both parties agreed. He further stresses that the only conditions for the termination of spousal support were time limitations (36 months), or when defendant obtained employment with health benefits. Defendant further informs the Court that he needs the support money for daily living conditions, as he is unemployed, and "is on the verge of becoming homeless."

Plaintiff contends that the order of spousal support was clearly intended to pay for defendant's COBRA benefits<sup>1</sup>, and that it is probable that the non-modifiable language was inserted in case the COBRA premium was increased. Plaintiff argues that when read in its entirety, the provision concerning spousal support cannot be considered non-modifiable because

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<sup>1</sup> It is asserted that the fixed amount of \$295.89 represented the monthly COBRA payment, thus reinforcing plaintiff's position that the spousal support was intended specifically to pay the monthly COBRA payments.

of the conditions imposed on it, i.e., in the event defendant is awarded any worker's compensation benefits, spousal support payments shall be suspended until a determination is made whether the payments should continue or not, and if defendant obtains employment with health care benefits within 36 months the spousal support shall cease. The Court also points out that on page 4 of the Consent Judgment of Divorce, regarding COBRA benefits it is stated, "... [defendant] **shall** take the continued health care coverage for a period of three (3) years ... or should he have gainful employment which provides medical coverage at which time COBRA benefits terminate, whichever occurs first." [Emphasis added.] This provision clearly comports with the terms of the Spousal Support conditions as found on page 2 of the judgment.

Aside from the statutory law, MCL 552.28, *supra*, the law regarding non-modifiable spousal support is as follows. When a trial court renders an award of spousal support in a judgment of divorce, it retains continuing jurisdiction over the issue of spousal support subject to a petition by either party pursuant to a showing of changed circumstances. MCL 552.28; *Ricknew v Frederick*, 459 Mich 371, 378-379; 590 NW2d 288 (1999). Any declaration that spousal support is non-modifiable with respect to amount or duration "no matter what change of circumstances occurs ... in the future, constitutes an abuse of discretion." *McCallister v McCallister*, 101 Mich App 543, 551; 300 NW2d 629 (1980).

The party moving for modification has the burden of showing such new facts or changed circumstances. *Ackerman v Ackerman*, 197 Mich App 300, 302; 495 NW2d 173 (1992).

The Court in *Gates v Gates*, 256 Mich App 420, 435; 664 NW2d 231 (2003) reaffirmed the principle that either party may seek a modification of an award of spousal support at any time, and that the party seeking the modification, whether upward or downward, bears the burden of proving the justification for the modified award.

Discussion

When all's said and done, the issue before the Court is without contest, cut-and-dried. MCL 552.28 provides for a change in support due to changed circumstances; case law states that any declaration that spousal support is non-modifiable with respect to amount or duration ... constitutes an abuse of discretion; see *McCallister, supra*. Plaintiff has met her burden of showing new facts and changed circumstances such that a modification is justified, that is, defendant failed to comply with the terms of the consent judgment of divorce and maintain his COBRA benefits for three years, thus constituting a change in circumstances.

The spousal support section in the consent judgment concerns itself exclusively with payment to cover COBRA payments and nothing else, such as rehabilitation, job retraining, or any other circumstance aside from the COBRA payment. The COBRA benefits section mandates that defendant maintain the health care coverage for a period of three years, or until he obtained gainful employment that provided health coverage.

For the above-stated reasons, plaintiff's request for an order terminating the award of spousal support, retroactive to March 31, 2006,<sup>2</sup> is GRANTED. Further, the recommendation regarding Michigan State income tax returns is DENIED for the reason that this issue was not before the Court therefore the Court has no information in front of it from which to make a judgment. Pursuant to MCR 2.602(A)(3), this case remains CLOSED.

IT IS SO ORDERED.

August 3, 2006

**ANTONIO P. VIVIANO**

CIRCUIT JUDGE

Antonio P. Viviano, Judge  
AUG 03 2006

**A TRUE COPY**

CARMELLA SABAUGH, COUNTY CLERK

<sup>2</sup> The date of COBRA termination due to non-payment as exhibited in Exhibit B of plaintiff's brief. Court Clerk